No. 12,348

IN THE

United States Court of Appeals

For the Ninth Circuit

TOWN OF FAIRBANKS, ALASKA, a Municipal Corporation,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, INC., and CHARLES SLATER,

Appellees.

BRIEF FOR APPELLEE UNITED STATES SMELTING REFINING AND MINING COMPANY.

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BRIEF FOR APPELLEE UNITED STATES SMELTING REFINING AND MINING COMPANY.

STATEMENT AS TO JURISDICTION.

This is an appeal from a judgment of the District Court of the United States for the Territory of Alaska, Fourth Judicial Division, dismissing appellant's petition for the annexation of certain lands to the Town of Fairbanks, Alaska.

For the purposes of this appeal appellee United States Smelting Refining and Mining Company, hereinabove called United States Smelting, Refining and Mining Com-

pany, Inc., does not question appellant's statement of the jurisdiction of the district court over the subject matter of the action (App. Br. 2) and admits the jurisdiction of the Court of Appeals to review the judgment of the district court.

STATEMENT OF THE CASE.

On or about November 9, 1948, the Town of Fairbanks, a municipal corporation in the Territory of Alaska, purporting to act under the laws of Alaska relating to annexation by municipalities (A.C.L.A. 1949, sec. 16-1-22, formerly C.L.A. 1933, sec. 2419, as amended), filed in the District Court for the Territory of Alaska, Fourth Judicial Division, its petition to annex certain nearby lands (R. 2). The statute requires that the petition must be "signed by a majority of the owners of substantial property interests in land or possessory rights in land * * * within the limits of the territory so proposed to be annexed * * *" and that "there shall be attached thereto a plat * * * stating * * * the number of owners of property * * *" in said territory.

Inter alia, the petition alleged there were 282 owners of substantial property interests in land or possessory rights in land or improvements upon land in the territory sought to be annexed (R. 5). The material allegations of the petition were put in issue by the answers of appellees (R. 24, 30). Appellee United States Smelting Refining and Mining Company denied the allegation of ownership (R. 25). Appellee Slater alleged that there were more than 310 such owners (R. 31).

At the hearing appellant introduced some evidence in support of its petition. The only evidence as to the number of owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tideland within the limits of the territory sought to be annexed was the testimony of the assistant to the Territorial Land Registration Agent. She testified that the names of 207 persons had been registered in the General Land Office as owners of land in said territory (R. 123) and that 106 of those persons had signed the petition (R. 123). Appellant's counsel offered no further evidence of ownership, and voluntarily rested (R. 128). Appellees moved for a nonsuit or dismissal of the petition on the ground that appellant had failed to prove that the petition was signed by a majority of the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tideland within the limits of the territory sought to be annexed (R. 128). After argument by counsel for both sides, the motion was granted and the petition dismissed (R. 132).

SUMMARY OF ARGUMENT.

1. The granting of a nonsuit and dismissal of appellant's petition by the court below were proper because appellant failed to prove the total number of owners of substantial property interests or possessory rights in land in the area sought to be annexed. In order to show that it had obtained the signatures of a majority of the owners of substantial property interests or possessory rights in land in such area, it was mandatory that appellant prove

the total number of such owners. In justifying the Assistant Registration Agent's testimony, appellant relied solely upon the 1947 amendment to the Alaska annexation statute which provided merely that owners of land who filed statements asserting ownership in the General Land Office would, for purposes of annexation proceedings, be presumed to be the owners of substantial property interests. This amendment did not provide that the owners who registered would be presumed to be all the owners of land in the area. Furthermore, by its verified petition appellant has admitted that there were more owners of substantial interests than those registered, and it was incumbent upon it to show how many more.

2. Appellant's failure to meet the mandatory requirement of proving the total number of owners constituted a failure of proof rather than an immaterial variance. No amendment to the petition could rectify this failure of proof, and the nonsuit was properly granted.

ARGUMENT.

1. APPELLANT, IN ATTEMPTING TO PROVE THE TOTAL NUMBER OF LAND OWNERS IN THE AREA SOUGHT TO BE ANNEXED, FAILED TO MAKE THAT REQUIRED PROOF BY MERELY SHOWING THAT 207 PERSONS HAD REGISTERED THEIR CLAIMS OF OWNERSHIP OF CERTAIN PARCELS OF LAND IN THE GENERAL LAND OFFICE.

Since appellant's specification of error does not state in particular wherein the court below erred as is required by Rule 20, paragraph 2(d) of this Court, appellee is not certain of appellant's position here. Irrespective of appellant's contentions, however, we contend that the district

court did not err in granting a nonsuit and in dismissing appellant's petition.

The only question presented by this appeal is whether appellant's showing that 207 persons claimed substantial property interests or possessory rights in particular parcels of land constituted proof that those persons were the only owners of land in the territory sought to be annexed.

In an annexation proceeding such as this, Alaskan law makes it mandatory for the petitioner, appellant here, to prove that a majority of owners of substantial property interests or possessory rights in land have signed the petition (A.C.L.A. 1949, sec. 16-1-22; formerly C.L.A. 1933, sec. 2419, as amended; set forth in full in appendix hereto). Proof of a majority necessarily requires proof of the total number.

The court below was correct in dismissing the petition on the ground that appellant had failed to prove its case. Appellant alleged 282 owners of substantial property interests or possessory rights in land, but its only showing was the testimony of the assistant to the Land Registration Agent (R. 123) that 207 persons had filed statements of ownership of interests in particular parcels of land in the General Land Office pursuant to the Land Registration Act of 1945 (Laws of Alaska 1945, ch. 49; A.C.L.A. 1949, secs. 22-2-1—22-2-18, set forth in part in appendix hereto). Appellant did not and could not show that all the land in the area sought to be annexed was claimed by those 207 persons, and it made no attempt to prove the total number of owners in the area.

Appellant voluntarily chose to rest on this showing in spite of the fact that the list of signers of the petition (R. 9-19) reveals many persons claiming an interest in land who had not registered their claims. The same list, and the plat attached thereto which is an exhibit on this appeal, shows that a portion of the area sought to be annexed was subdivided into lots and blocks. Appellant could have examined the lot and block books to determine the ownership of land not covered by registration statements. The list of signers of the petition also shows that documents evidencing interests in parcels of land were recorded or filed in at least seven different depositories, several of them being public depositories. Since the burden of proof was on appellant, the very least that it was required to do under the annexation laws was to examine these sources of information in an effort to prove total ownership. Appellant's petition alleging 282 owners of interests in land was verified by the Mayor of the Town of Fairbanks and also by a property owner. Some examination must have been made and some evidence adduced to support this verified statement on the date the petition was filed. The same evidence must have been available on the date of the trial. Nevertheless, appellant made absolutely no effort to introduce such evidence and chose to rely only on the records of the General Land Office, admittedly incomplete, in proving its case.

Standing by itself, the testimony introduced by appellant would not be sufficient even to prove the individual ownership asserted by the land registration statements, since it is not the best evidence, is a conclusion of law and is not sufficiently relevant to overcome these other ob-

jections. As was pointed out by the assistant to the Land Registration Agent when she testified (R. 86, 87, 92, 93), anyone could file a statement of ownership for any number of people if the person filing took the required oath.

Considered alone this testimony could by no stretch of the imagination be sufficient to prove that there were *only* 207 owners. Yet this is just what appellant is claiming, and the claim is based entirely upon a 1947 amendment (made ineffective by a 1949 modification of the Land Registration Act of 1945) to the annexation laws of Alaska previously passed in 1923. The 1947 amendment reads as follows:

> "Those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership in the United States General Land Office for the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945 [§§ 22-2-1—22-2-18 herein], shall be presumed to be the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary" (A.C.L.A. 1949, sec. 16-1-22; Laws of Alaska 1947, ch. 50).

The statute says that "Those owners * * * who have filed a statement * * * shall be presumed to be the owners of substantial property interests in land or possessory rights in land."* This provision makes the evidence intro-

*Appellant's bald assertion (App. Br. 19) that the statute creates a presumption "that those *who have registered* are *all the owners* entitled to sign such a petition" is simply contrary to the express language of the statute.

duced by appellant sufficient to prove the ownership asserted in the statements. It does not, as appellant contends, make the evidence sufficient to prove the total number of owners, and make those persons who have registered with the Land Office prima facie "all that are entitled to be considered interested" (App. Br. 8).

This is the crux of the case, and unless "the owners" means the same thing as "all the owners" the nonsuit was properly granted.

Appellant has devoted nine pages of its brief (App. Br. 10-19) to quoting and discussing general decisions, although none of them is in point on the particular issue raised by appellant. We are in entire agreement with the "Hornbook" law stated in those cases that statutes are to be interpreted according to the plain, ordinary meaning of the language used and to the declared purpose and intention of the legislature.

The plain, ordinary meaning of the 1947 amendment is that individual ownership of a substantial property interest or possessory right in a parcel of land may be proved in the first instance in annexation proceedings by the statement of ownership filed in the Land Office instead of offering proof of title in fee, under contract of sale, or some lesser estate, or even tenancy for years.

Inasmuch as the records of the 1947 session contain no discussion of the amendment, the declared purpose of the legislature must be ascertained from what it said, from what it did not say, and from the results flowing from various interpretations.

The 1947 legislature said "the owners"; it did not say "all the owners." Had it meant "all the owners" it would have said "all the owners." If it had said "all the owners" then appellant could make a prima facie case by showing that only one person had filed a statement of ownership, although in fact there were many owners. Such a ridiculous result is in itself evidence that the legislature did not intend to say "all the owners."

In an attempt to invent a purpose behind the 1947 amendment beyond that expressed in the statute itself, appellant has soared beyond the record into the realm of fancy. We recognize that the discussion of the earlier annexation proceeding (App. Br. 18, 19) is not properly a part of this case; but we also recognize that it reveals the fallacy of appellant's position. Thus in connection with the earlier annexation proceeding appellant states that the district court:

> "* * * ruled that testimony by one who had made a 'last record owner' search of the real property records was incompetent to show even a 'claim of ownership' unless coupled with proof of actual possession by the last record owner; and if the property was vacant he indicated he would quite likely hold an abstract of title necessary to make proper proof" (App. Br. 19).

This statement by appellant contradicts its later assertion that the 1947 amendment was "the legislative design to facilitate the showing of a 'petition by a majority'" (App. Br. 19). It is clear from the statement that the district court in the earlier proceeding was considering

the method of proving the claims of various persons to individual parcels of land in the area sought to be annexed, not the method of proving the total number of owners.

Appellant has even gone so far as to infer that the Land Registration Act of 1945 was passed so that in 1947 the legislature could amend the annexation laws and provide that persons filing a statement of ownership should be presumed to be "all the owners" of land (App. Br. 9-10). If this were so, why did the legislature wait two years and then omit the word "all"?

Appellant has failed to call this court's attention to the Act of March 25, 1949 (Laws of Alaska, 1949, ch. 106) which provides in part as follows:

> "Section 1. That the provisions of the Land Registration Act, Secs. 22-2-1 to 22-2-18 ACLA 1949 are hereby modified as follows:
>
> (a) On and after July 1, 1949, the land registration requirements set forth in said sections shall cease to be of further effect, but rights and liabilities accrued under said provisions and regulations made pursuant thereto prior to said date shall remain in full force and effect.
>
> * * * * *
>
> (c) It is the intent and purpose of this Act to secure a check of the list of patented properties which have been duly registered in each judicial division against the records of the Bureau of Land Management for the information and use of the respective divisional boards of assessment and their assessors in making up tax rolls under the purview of the Territorial Property Tax Act."

The legislature itself has succinctly stated the real purpose behind the Land Registration Act of 1945 in subparagraph (c) above. That purpose was solely to get property outside incorporated towns on the assessment rolls.

Possibly appellant overlooked this 1949 Act (enacted *after* the trial of this case but *before* the appeal was taken) because subparagraph (a) repealed the land registration requirements of the 1945 Act and abolished the evidentiary effect of the statements of ownership. Under any theory of this case this would require appellant to prove not only total ownership but also the ownership asserted in each statement.

Appellant thus finds no support for its contrived theory either in the language of the 1947 amendment, in the declared purpose and intention of the legislature, in the practical results to be expected or in its own procedure in preparing and filing the petition for annexation.

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2. APPELLANT'S FAILURE TO PROVE THE TOTAL NUMBER OF LAND OWNERS CONSTITUTED A FAILURE OF PROOF RATHER THAN AN IMMATERIAL VARIANCE.

From the previous discussion it is apparent that appellant's argument (App. Br. 20-31) that this failure to prove total ownership is an immaterial variance rather than failure of proof is without merit. We do not claim, as appellant asserts (App. Br. 20, 26), that it had to prove 282 rather than 281 or 283 owners. We claim only that appellant must prove something, be it 281, 282, 283 or some

other number. Had appellant proved that there were 281 owners, or even only one owner, there would be a variance, and under Alaska Compiled Laws Annotated, 1949, section 55-5-71, the pleading should be amended to conform to the proof. But before there can be a variance requiring or permitting amendment, the total number of owners must be proved. This is just what appellant failed to prove.

Appellant's attack on the lower court (App. Br. 22) is unjustified. It again illustrates appellant's failure to see the issue in the case. We agree with appellant's remark that "A lawsuit is not a game between opposing counsel," but this should not be used as an excuse for failure to prove a case. Appellant complains that the Court did not permit it to amend (although appellant did not ask to do so), and that the Court did not amend the petition on its own motion (in spite of appellant's failure to ask that it be amended), and that the Court did not comment "on whether he deemed the pleadings amended" (App. Br. 22) (though appellant asked no such comment). No amendment could have any effect on the ultimate outcome of this case. The fact remains that appellant voluntarily rested (R. 128), did not ask permission to reopen and admits that it had no more evidence (App. Br. 28).

It is obvious that the Court realized that whether the petition was amended or not would make no difference in the ultimate decision, for in ruling on the motion it said:

> "The fact that they showed there were 207 who registered, shows that there were that many that registered, but it doesn't show that there are others who

owned interest in the area and who have failed to register, so the motion is well taken and will be granted'' (R. 132).

Assuming that the Court had either permitted an amendment or considered the petition to have been amended (as it may well have done), appellant is still faced with the necessity of filing in the district court ''a petition signed by a majority of the owners of substantial property interests in land or possessory rights in land * * *.''

Again assuming that the petition had been amended, as appellant now claims should have been done, proof that 207 persons owned the land they claimed to own is not proof that there were only 207 owners. By the same token, it is not proof that a majority of all the owners had signed the petition.

In that state of the record what else could the Court have done but have *''ruled and left the bench''* (App. Br. 22) or proceeded to the next case? The record on appeal does not show what happened after the ruling.

A far more reasonable and logical conclusion from the record is that the Court realized the incidental character of these matters, and knew that whether the petition was amended or not, unless the 1947 amendment meant that registered owners were all the owners, appellant could not prevail on the theory it adopted in trying the case as well as in resisting the motion for nonsuit or dismissal.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court of the Territory of Alaska, Fourth Judicial Division, should be affirmed.

Dated: April 5, 1950.

Respectfully submitted,

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United States Smelting Refining and Mining Company.

PILLSBURY, MADISON & SUTRO,

ALLAN R. MOLTZEN,

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(Appendix Follows.)

Appendix.

§ *16-1-22. Petition, hearing and order for election: Persons presumed owners of property.* Whenever the council of any city shall desire to enlarge the limits of said city by annexing the territory contiguous thereto, they shall file in the district court for the judicial division wherein the city is located, a petition signed by a majority of the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tideland within the limits of the territory so proposed to be annexed, setting forth by metes and bounds the territory sought to be annexed to such city, and there shall be attached thereto a plat based upon an actual survey by a competent surveyor setting forth the limits and boundaries of the territory to be annexed by metes and bounds and stating the number of inhabitants therein, as well as the number of owners of property therein situate and such other facts as the court may require. Said petition shall be sworn to on behalf of the city and by at least one of the property owners herein provided for. Said petition may be presented in open court or to the judge of said court in chambers and said judge shall fix a time and place of hearing on the petition and shall cause notice of said hearing to be posted in at least three of the most public places in such city and in three places within the territory sought to be annexed, and if a newspaper be published in said city, then to publish such notice at least three times in such paper. Such notices shall be posted at least four weeks before the hearing

and the first publication of such notice in the newspaper shall be at least four weeks before the hearing. The court shall make diligent inquiry as to the reasonableness and justice of the petition and if the court be satisfied from proofs and evidence that no private rights will be injured by granting the petition and if it is just and reasonable that the annexation take place, the court shall, unless it be shown that the petition is not bona fide or that one or more of the signers thereto are not owners of substantial property rights as herein provided or fails to comply with the requirements of this act in any other respect, order an election.

Those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership in the United States General Land Office for the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945 [§§ 22-2-1—22-2-18 herein], shall be presumed to be the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary. [L. 1923, ch 97, § 51, p 215; CLA 1933, § 2419; am L 1947, ch 50, § 1, p 119, effective March 20, 1947.] (A.C.L.A., 1949, sec. 16-1-22)

§ *22-2-1.—Duty of owner or transferee to file statement: Exemptions*: *Penalty*: *Lien.* It shall be the duty of each owner of land, other than of land to which the United States, or an agency or instrumentality thereof holds title, or which is owned by the Territory or a subdivision,

agency or instrumentality thereof, or by an Indian Nation, tribe, band or a member thereof, or is located within an incorporated town, to file in the United States Land Office for the District in which the land is situated, on or before June 30, 1946, a sworn statement, or a statement signed by two witnesses when it is impossible to obtain a sworn statement, giving his name, his post office address, a description of the tract of land, its acreage, use, character, and any other information necessary for the purposes of this Act. Upon a transfer of title to a tract of land on or after January 1 of any year, a statement in the form required by this section must be filed by the owner of such newly acquired tract of land on or before December 31 of that year, unless such owner is within one of the classes exempted by this section from filing such a statement. The owner of a tract of land who has made a proper return as to such land in any year, as prescribed by this section, need not thereafter file a statement under this section. Upon failure to file a statement, as required by this section, the owner shall be subject to a penalty of $5 which shall be a lien against the land as of January 1 of the ensuing year and subject to collection as hereinafter provided. [L 1945, ch 49, § 1, p 112.] (A.C.L.A., 1949, sec. 22-2-1)